Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

80-1181

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

WILLIAM A. McCALL, SR., THE DREDGE CORPORATION, a Nevada corporation, and THE ESTATE OF OLAF H. NELSON,

Petitioners,

v.

CECIL D. ANDRUS, Secretary of the Interior of the United States of America, et al.,

Respondents.

SMALL TRACT APPLICANTS ASSOCIATION,

Intervenor.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
IN CASE No. CA 77-3429

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QUESTIONS PRESENTED

1. Whether petitioners were required to prove valuable mineral deposits by showing a general market for the minerals on their claims, or required to show specific sales of minerals from each of their claims.

2. Whether agency policy decisions exceeded discretionary statutory powers when applying the "too much", or excess reserves rule, which amounts to legislative enactment by executive tribunals which lack such authority under our system of separation of powers.

3. Whether summary judgment should be sanctioned for judicial review of administrative proceedings concerning validity of mining claims, where isolated portions of evidence supporting agency position are considered and evidence supporting the mining claimants' position is disregarded when the proper standard is the "evidence considered as a whole rule", as interpreted by this honorable Court and as promulgated under the Administrative Procedure Act.

4. Whether public resentment of excessive bureaucracy and its cost and the resentment of bureaucracy's claiming to own some 86% of the land in Nevada presents a constitutional crisis of sufficient importance to call for issuance of the writ to review on the merits petitioners' patent application Nevada 012928.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following members of the agency were named below:

John F. Boyles, District Manager, Bureau of Land Management; William J. Malencik, Chief, Division of Technical Services, Bureau of Land Management; E. I. Rowland, State Director, Bureau of Land Management; Burton W. Silcock, Director, Bureau of Land Management; Rogers B. Morton, Secretary of the Interior, Department of the Interior.

In our view, it is sufficient to substitute and name only the present Secretary of the Interior, Cecil Andrus.

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OPINIONS BELOW
(Reproduced in the Appendix hereto)

The administrative decision of the United States Department of the Interior concerning Petitioners' application for mineral patent Nevada 012928 is found in: the unreported decision of the Hearing Examiner, August 15, 1968, in Contests Nevada 3092-3095, 3097-3106, 3108-3113 and 3224, set out A-31, and the decision of the Interior Board of Land Appeals, March 22, 1971, published in 2 IBLA 64 and in 78 I.D. 71. Set out A-53.

The decision of the United States District Court for Nevada, June 15, 1976, affirming the administrative decision, is unpublished. Set out A-6.

The unpublished decision of the United States Court of Appeals for the Ninth Circuit, affirming the District Court, June 15, 1976, is set out A-1.

The unpublished order of the Ninth Circuit denying plaintiffs' petition for rehearing, entered October 18, 1980, is set out A-30.

JURISDICTION

This petition for writ of certiorari is timely filed within 90 days from October 17, 1980, when the United States Court of Appeals for the Ninth Circuit entered its order denying petition for rehearing.

The statutory provision believed to confer jurisdiction on this Honorable Court is 28 U.S.C. Section 1254.

STATUTES INVOLVED

(In pertinent part only)

30 U.S.C. Sec. 22. Lands open to purchase by citizens.

> "Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States..."

30 U.S.C. Sec. 35 Placer claims

> "Claims usually called "placers", including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; . . ."

30 U.S.C. Sec. 611 Common varieties

> "A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: . . .
> (July 23, 1955)

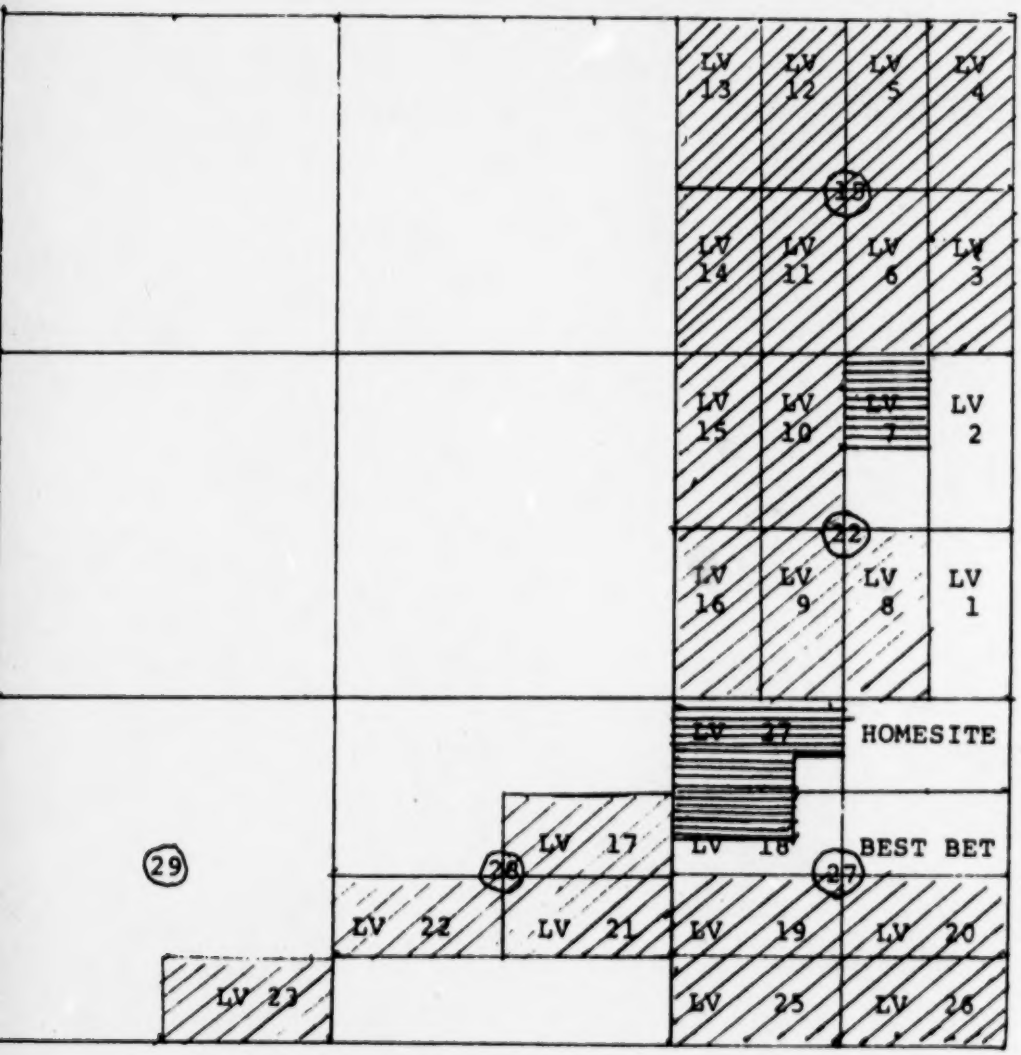
STATEMENT OF THE CASE

Facts material to consideration of the questions presented are as follows:

This case involves twenty-one placer mining claims, eighty acres each, five miles from the center of the City of Las Vegas, Nevada, located on ground open to mineral entry for sand and gravel on March 20, 1948, by V. D. Bradley et al. The claims were conveyed on June 1, 1948, to O. H. Nelson, whose estate is one of the petitioners. September 24, 1952, O. H. Nelson conveyed a one-half interest in the claims to William A. McCall, Sr. A-32.

On March 24, 1953, Mr. Nelson and Mr. McCall filed application for patent Nevada 012928 to all of the claims ex-

LAS VEGAS PLACER CLAIMS
Situated in Sections 15, 22, 27, 28 & 29
Township 20 S., R. 60 E., M.D.M. - Nevada



LAS VEGAS PLACER CLAIMS Nos. 3,4,5,6,8,9, 10,11,12,13,14,15,16,17,19,20,21,22,23,24, 26, contested in CA 77-3429

Unpatented fractions of claims 7, 18, 27 at issue in CA 78-1065

Ground patented previously.

cept Las Vegas No. 23.

Some six months later, October 2, 1953, the land was classified for disposal under the Small Tract Act. A-32. October 8, 1954, the Bureau of Land Management issued a final certificate to Nelson and McCall. A-32.

On March 18, 1960, the agency filed contest complaints challenging the discoveries as to Las Vegas Nos. 3 through 6, 8 through 17, 19 through 22, 25 and 26.[1/]

March 27, 1959, Las Vegas No. 23 was conveyed to the Dredge Corporation. A contest complaint against Las Vegas No. 23, filed June 21, 1961, alleged lack of market for the mineral materials before July 23, 1955. A-32, 33. The contests involved in the present case, CA 77-3429, were tried together April 21 to 23, 1965.

John R. Rampton, Hearing Examiner,

1/ Claims Nos. 1, 2, 7, 18 and 27, also contested in 1960, have been patented in part and are the subject of the companion case for which writ of certiorari is also sought, McCall et al. v. Andrus et al., CA 78-1065.

concluded August 15, 1968, that:

> "The allegations of the complaints have been sustained and the Las Vegas Nos. 3 through 6, 8 through 17, 19 through 23, 25 and 26 placer mining claims are held to be void." A-52.

Except as to claim No. 23, the charge of want of marketability of the mineral in the contest complaints speaks as of the date of the contests filed in 1960 and tried in 1965. The charge that the mineral lacked a market before July 23, 1955, was made only in the complaint filed against claim No. 23. A-33. Yet the Hearing Examiner based rejection of patent to all the claims on a conclusion "that the market, if it now exists, for the material found on the claims in issue came after the passage of the Act of June 23, 1955." A-52. He rejected 20 of the claims on the basis of a charge not made in the contest complaints. His decision is inconsistent with his finding:

> There is, at present, a market for a portion of the sand and gravel found upon these claims. A profitable operation now exists on the Las Vegas Nos. 12 and 13. However, there is no

> present market for all of the material found upon the claims in issue. These 21 claims encompass 1,680 acres. There are approximately 1-1/2 tons of gravel in a cubic yard; using this figure as a basis, a 1,680-acre excavation, 12 feet deep, would yield 49,000,000 tons of sand and gravel. If the present yield of approximately 400,000 tons a year continues, the claims contain enough reserves for approximately 121 years. Mr. Bradley, operating on the adjacent homesite claim, has gone down to a depth of 35 feet, and, if gravel from the claims in issue was excavated to this depth, the reserves at the present rate of production would last 363 years." A-43.

In the agency decisions, analysis of the evidence distorts testimony supporting marketability of sand and gravel on the contested claims and warps its meaning into support for the agency's position. Statements favorable to the contestees are ignored or misinterpreted.

For example, the Hearing Examiner's decision minimizes erroneously the commercial use of material from the contested claims made in 1948 by Vernon Bradley, who was then the major producer of gravel in the Las Vegas area. The

agency decision states: "Approximately 500 total tons of material were sold from all of the 27 claims which he had located." A-41. But Mr. Bradley testified that in 1948 he sold this fine material, ideal for patching concrete in 500 ton lots. Tr 280. They bladed a road into claims Nos. 3 and 4, in Section 15, Tr 279, 280. They would windrow the fine, sandy material, mix it with oil and haul it from there to the City yards. Tr 300.

Mr. Bradley's crew did discovery work on each of the contested claims, and found sand and gravel on each of them. Tr 278-279. They took a minimum of 50 to 100 yards from each of the 20 claims. Tr 280-281.

Mr. Bradley's testimony establishes that the claims were located not only as reserves but for immediate commercial use in 1948 of the various types of gravel readily accessible in the washes which cross the area. Tr 276, 278.

While Mr. Bradley did not keep watch over Mr. Nelson's operations after he sold out in 1948, he knows that Mr. Nelson obtained materials needed for

the air base from the claims up the big wash that runs through Section 28 (where claims 17 and 21 are located). Tr 297., 298. Mr. Bradley stated that quite a bit of bulldozer work had been done before Mr. Nelson hired him to put down in 1957 the backhoe trenches on ten-acre subdivisions. Tr 302.

Mr. Bradley knew that Mr. Nelson made use of great quantities of material from the Las Vegas claims to fill the huge contracts he performed from 1948 into the early 1950's such as the Charlestone Underpass. Tr 293.

Mr. Bradley's testimony does not justify the statement in the Court of Appeals decision that his testimony supports the government's prima facie case. A-5. While Mr. Bradley did not pay much attention to how much material was removed from the contested claims from the time he sold out in 1948 to 1957, and could not say whether any significant amount was produced from those claims during that time (Tr 305), this does not amount to a statement

that he "did not know of the removal of any significant amounts of material from the contested claims prior to 1955", attributed to him by the court below A-5. His own removal of material in 1948, wrongly stated by the Hearing Examiner to have occurred in 1957, was sufficient to establish that each of the claims contained readily accessible material suitable for commercial use in the then existing market. It was "just enough to prove to ourselves that it was what we were looking for." Tr 291. It would meet specifications. After having tested that the claims contained material valuable for commercial use, it was not necessary to carry on continuous exploitation; they could be held as reserves in an area that "was the closest gravel to town" Tr 318 and was certain to experience increasing market demand as the city continued to grow. Mr. Wells, president of Wells Cargo, Co., which owned the adjoining Best Bet claim, testified that for that reason he wanted to acquire an

interest in the Las Vegas group of claims from 1950 on. Tr 340-341. "Where these big washes and these alluvial fans that come down through these deposits here, makes this one of the most ideal gravel locations on the northwest side of the City." Tr 350 (Wells). "As I said, I know that these particular deposits would meet specifications on any material that we have ever been required to produce in this area." Tr 350.

The Hearing Examiner's misinterpretation of the evidence concerning marketability of the material on the claims A-41 was repeated in the IBLA opinion A-63, which was copied as the findings of the District Court A-14, and it influenced the decision of the Court of Appeals.

All the decisions disregard the testimony of the Government's expert witness, Mr. Scarfe, that loose gravel occurs above the cemented gravel, which he called caliche, throughout the area of the claims A-60 and dwell upon the added expense that breaking up the cemented gravel would

require. Mr. Wells' testimony does not state that the cost of blasting the cemented gravel was prohibitive or precluded exploitation of the contested claims. "It is a little costlier and we certainly don't like to do it unless we have to...If it is necessary to drill it and shoot it, we do." Tr 351. There is nothing in the record to establish that the cemented gravels, which make high specification gravel, could not be mined at a profit even though the cost of blasting might result in a smaller profit as compared to mining the loose gravels, prior to the time when improved equipment made such mining easier.

The Court of Appeals decision overlooks the fact that cemented gravel does not cover the claims like a table cloth covers a table but only outcrops sporadically on the surface and occurs in other places at varying depths from one to four feet below the surface. Tr 144 (Scarfe). The Court of Appeals decision reflects

an over-simplified description of the claims, suggested by the hearing examiner's decision A-40 that the loose gravel on the claims was overlain with a layer of hard cemented gravel and could not have been mined profitably to supply the existing demand for sand and gravel. A-4.

Mr. Scarfe's statement that there had been trenching and bulldozer work on the claims but no mining of the 20 claims in 1959 (Tr 180) disregards the fact that the shallow excavations made in the washes in 1948, testified to by Mr. Bradley, would have been obliterated by the recurring seasonal floods.

None of the decisions mention the evidence favorable to the mining claimants provided by Mr. Scarfe's study of market demand for sand and gravel in the Las Vegas area, which showed a very substantial market in the period prior to 1955 and a rapid increase thereafter. Tr 150-, 153, 167.(Scarfe).

Mr. Scarfe testified that on the basis of Bureau of Mines figures for consumption of sand and gravel, he had estimated the quantity marketed in the Las Vegas area for the years 1950 through 1957, and projected the estimate on for the next 20 years. Tr 160, 166. For the 12 year period from the middle of 1947 through the middle of 1959, he estimated that 15 million tons of gravel had been used in the Las Vegas area, and that for the 20-year period from July 1959 through July 1 1979, 73 million tons would be used. Tr 167. Dividing these figures by the number of years would give an average market in the critical period prior to 1955 of one and a quarter million tons.

Mr. Scarfe also testified for the Government that the material on the contested claims, including the cemented gravels was similar to that which was being mined on the Wells Cargo operation, a short distance to the south, Tr 203, and that even the cemented gravels could be processed into satisfactory specification gravels. Tr 186.

The fact that the classification of the land covered by the mining locations for disposal under the Small Tracts Act, made after location of the mining claims had segregated the land from the unappropriated public domain and had closed the land to other disposition, was illegal, was pointed out at the contest hearing by Mr. Nilsson, attorney for the mining claimants. Tr 112, 411. It was raised in the District Court and was called to the attention of the Court of Appeals in petitioners' briefs.

The decision ignores the evidence from the administrative file shown by intra-agency correspondence quoted in petitioners' Reply Brief, pp. 22-24, which reveals the embarassment caused by the hundreds of Small Tract applications, represented by the Intervenor herein, Small Tract Applicants Association. For example, the agency's eagerness to invalidate the petitioners' mining claims in order to satisfy the Small Tract applicants is shown by the letter from the State Supervisor

of the BLM for Nevada to the Director January 24, 1961:

> "The patent application was filed on March 27, 1953, and since that time, it has been the subject of no less than six independent mineral examinations. In addition to the possibility of having to perform a seventh examination, there is the problem of 495 small tract applications existing on the subject lands. Since many of these cases have been pending since 1953, you can understand our concern over the possibility of prolonging their final adjudication any longer than is necessary.
>
> "To further compound the problem, the mineral applicants have placed a crushing and screening plant on one of the claims and are producing aggregate. There is no legal bar to prevent the removal of the material from the claim, and technically, the operation should have no bearing on the outcome of the hearing, should one ever be scheduled. However, from a practical point of view, the presence of equipment producing sand and gravel products for sale in the Las Vegas market, cannot but help to strengthen the applicant's case and weaken our own.
>
> * * * *
>
> "We would like to proceed against the remaining claims even if it necessitates two separate hearings.

> By so doing, we will be acting on 441 Small Tract cases as well as a major portion of the mineral application.
>
> "Anything you can do to precipitate the rescheduling of this case for hearing will be deeply appreciated."

The decision below assumes on the basis of Mr.Scarfe's testimony that he did not see any evidence of mining on the claims having been done prior to his 1959 examination that in order to establish discovery it was necessary to drill and blast the cemented gravels. A-5. The court below failed to recognize that when patent was applied for, the Foster v. Seaton criteria of bona fides in development, accessibility, proximity to market were satisfied by mining the loose gravel in the dry washes, which was then the customary way of establishing discovery. Tr 292.

The decision below is based upon uncritical acceptance of findings which the District Court had copied from the IBLA decision, which were based on misstatement of testimony given by wit-

nesses for the contestees. For example, the Hearing Examiner's assumption that "At that time (1948 when Mr. Bradley made commercial use of material from the contested claims) there was no present demand for the material found upon the claims because the market was being supplied by existing sand and gravel plants" A-51 was actually contradicted by Mr. Bradley, who stated that the claims were located, not only for future reserves, but also because he had in 1948 an immediate need to make commercial use of the various types of gravel found on the contested claims to meet specifications for contracts, and that he did make actual commercial use of the material brought in from each of the 20 contested claims to test whether the claims contained commercially useful material - "just enough to prove to ourselves that it was what we were looking for." Tr 291.

George Monahan, registered professional engineer, made the following

affidavit, February 14, 1956, part of the patent application file Nevada 012928:

> "I, George Monahan, a duly appointed Resident Engineer for the Department of Highways, State of Nevada, during the years 1948, 1949 and 1950, do hereby certify I have inspected the Placer Claims leased by O. H. Nelson as shown by the map. I also tested samples taken from the claims and found the material to be of high quality which could be processed to meet the State Specification for Type 1 Base Material; Type 2 Surfacing and Plant Mix Aggregate. The processed material met all the requirements for concrete aggregate when washed and blended. The Claims with conglomerate and cemented material can be made to conform to specifications by blasting or the use of a ripper to break and loosen the material.
>
> "I herewith certify that the various aggregates used in the construction of the Main Street Bonanza Project 1948 and the Charleston Boulevard storm sewer project 1949 and 1950 came from the Placer claims shown on the map. These claims have high commercial value due to the high quality and quantity and the close proximity to the Las Vegas Market. Extensive improvements have

> have been made on the Placer Claims over a period of approximately eight years, including roads, wells, reservoirs and exploratory work.
>
> /s/ George Monahan
> GEORGE MONAHAN, Registered Professional Engineer, Nevada State License No. 631."

In 1948, the State of Nevada purchased aggregates for construction of the State Highway project in the City of Las Vegas, for which a contract in the amount of $253,204.86 was awarded to the Olof Nelson Construction Co., as well as the aggregate to construct the Charleston Blvd. underpass and storm sewer project costing $746,227.89. A letter in the patent application file, Nevada 012928, concerning this material furnished from the Las Vegas group of claims by Mr. Nelson states:

> "In regard to conglomerate, calechi and cemented material on the claims, I wish to state that a great deal of the hard pan material was ripped loose and mixed with the loose rock and sand with no detrimental effect to the aggregate used for Type 1 and Type 2 surfacing. The crused material to be processed for specification concrete aggregate containing calechi fines were also ap-

proved after washing and scrubbing at very little extra cost."

The United States District Court for the District of Nevada, Las Vegas Division, was the federal court of first instance in which the petitioners sought judicial review of the administrative rejection of patent, pursuant to the Administrative Procedure Act. Under 28 U.S.C. Section 1331, the district court had jurisdiction to hear the case arising under the mining laws of the United States, brought against an agency of the United States.

The Court of Appeals had jurisdiction to hear the appeal from the decision of the District Court under Title 28 U.S.C. Sec. 1291.

REASONS FOR GRANTING THE WRIT

There are special and important reasons why the writ should be granted. Doctor of Jurisprudence Alpheus Thomas Mason, a noted constitutional scholar, Princeton's McCormic Professor of Jurisprudence, Emeritus, warns that we are faced as a nation with our fifth constitutional crisis. This time, the clash

is between the mushrooming federal bureaucracy and a taxpaying electorate that resents its high costs. Princeton Alumni Weekly, January 15, 1979. President-elect Regan supported the movement in the Western States which expresses this resentment against bureaucratic control of Western lands. This movement has been named the Sagebrush Rebellion by the press.

If allowed to stand, the decision below will affect adversely the mining of all minerals, including strategic minerals in short supply. If domestic mining operations are shot down one by one, our national economy and defense will be in jeopardy.

A conflict of opinion exists between the Ninth Circuit and the Tenth Circuit, as recognized in Nickol v. United States, 501 F 2d 1389, 1390 (10th Cir. 1974). The court said, referring to the Ninth Circuit:

> "One court has characterized a judicial determination of whether a finding of fact (in an administrative proceeding) is supported by substantial evidence as 'only a question of law' and therefore 'subject to disposition by summary judgment'. Dredge Corp. v. Penny, 338 F2d 456 (9th Cir.).

See also Beane v. Richardson, 457 F2d 758 (9th Cir.); White v. Udall, 404 F2d 334 (9th Cir.); Henrikson v. Udall, 350 F2d 949 (9th Cir.); Todaro v. Pederson, 205 F Supp. 612 (N.D. Ohio 1961), aff'd 305 F2d 377 (6th Cir.); 6 Moore's Federal Practice p. 56.17 (3) at 2472-73 (1974).

"The very purpose however of such judicial review of agency action is to examine the facts in the record. Universal Camera Corp. v. NLRB, 340 U.S. 474 at 484. Thus, it would seem that the prerequisites for a summary judgment under Fed. R. Civ. p. 56 are absent in a review of the administrative record under the circumstances before us." 501 F2d at 1390.

The Supreme Court said in Universal Camera that a reviewing court should set aside an agency decision when it cannot find that the evidence supporting that decision is substantial, when viewed in the light of the record in its entirety, including the evidence opposed to the agency's view. 340 U.S. at 488. The Supreme Court (Mr.Justice Frankfurter) stressed that reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. p. 490.

We have shown in our Statement of Facts material factual evidence opposed to the agency's position, which should have been taken into account to view the record in its entirety. Agency findings based on selected portions of the evidence favorable to the agency's position and disregard of the probative facts which controvert that position do not constitute a proper basis for the decision of the court below.

Petitioners called to the attention of the court below misinterpretation in the administrative decision of testimony favorable to the petitoners' position, particularly the testimony of Mr. Bradley and Mr. Wells, showing that marketing of the sand and gravel present on each of the claims was commercially feasible prior to July 23, 1955.

Petitioners called to the attention of the court below the pressure placed upon the agency by the Small Tract applicants, represented in the case by the intervenor, to invalidate

petitioners' mining claims so that the land could be disposed of under the Small Tract classifications which had been made illegally, after location of the mining claims had segregated the land from the public domain and closed it to other disposal.

The agency decision was vitiated by distortion of the evidence used as basis for finding that the gravel on the claims was not marketable prior to the critical 1955 date. Mr. Bradley's sales in 1948 of fine material from claims 3 and 4 in Section 15 in 500 ton lots was shrunk to total sales of 500 tons of sand and gravel from all 21 contested claims prior to July 23 1955. His commercial use of material removed from each of the claims to test its marketability in 1948 was shifted to a time later than 1955. Mr. Wells' testimony that blasting was done when necessary was twisted into a statement that the cost of blasting precluded exploitation of the cemented gravels (called calechi, which is a rock and not gravel) and precluded mining

of sand and gravel covered by a layer of cemented gravels until after 1955.

Under those circumstances, the court below departed from the usual and accepted standard for considering the evidence in the record as a whole when it declared that the administrative decision was supported by substantial evidence.

The Supreme Court's interest in supervising the administration of justice in administrative tribunals and in the law courts should lead the Court to review the present case.

A general market demand for sand and gravel in the area is sufficient to establish marketability of material which meets the specifications of quality. To satisfy the marketability test petitioners need not show a demand for sand and gravel on each of their specific claims.

In United States v. Lauren W. Gibbs et al. 13 IBLA 382 (1973) the Board said:

> "Another oft-stated misconception, encountered again in this case, is the proposition that

> 'To satisfy the marketability test, a mining claimant must show the existence of a demand for the material on his specific claim, and not simply a general demand for the type of material in question.' We must acknowledge our own contribution to the perpetuation of this fallacy. See e.g. United States v. McCall, 2 IBLA 64, 78 I.D. 71, 80 (1971); United States v. Osborne, 77 I.D. 83 (1970) and cases therein cited. To require this of the claimant is to impose in most instances, an impossible burden upon him." 13 IBLA at 393.

In Gibbs, the Board disapproved of the very decision, United States v. McCall, 2 IBLA 64, 78 I.D. 71,80 here under consideration. A-53.

Gibbs rejected the doctrine of Osborne v. Hammit, 377 F Supp 977 (D.C. Nev. 1964) which requires proof of actual sales in order to satisfy the marketability aspect of the discovery requirement, rejecting anything less than actual production at a profit as credible evidence that gravel present on a mining claim in the Las Vegas area, which is one vast deposit of similar geologic origin and contains thousands of acres of gravel of the same general quality, could have been produced and

marketed at a profit. The District Court for Nevada said in Osborne v. Hammit:

> "If the locations of the Bradford sand and gravel claims were made in good faith under a genuine belief of the present profitable marketability of the product, there is no reason why plaintiffs should not have commenced the removal and processing of the material in 1952 and continued the profitable enterprise through 1954, when the hearing was held. If they had done so, their claims would perforce of law, have been sustained. Their failure to do so beclouds the reliability and evidentiary weight of the case presented by them.
>
> "We do not discount the value of opinion evidence from qualified witnesses in cases dealing with fairly unique deposits of locatable minerals. This case is different. Sand and gravel of the same general quality found in the Bradford Claims is readily available in thousands of adjoining acres. The burden of the proponent, plaintiffs here, is not simply to preponderate in the evidence produced, its burden is to produce a preponderance of credible evidence, and the trier of fact is not required to believe or to give weight to testimony which is inherently incredible. It is apparent from the evidence that if, in June 1952, owners of other claims

> near Las Vegas had commenced to produce and market sand and gravel from their properties, such action would have filled the theoretical void in the supply of the material to the Las Vegas market, rendering the Bradford Claims valueless. The plaintiffs failed to enter the race to supply the theoretical insufficiency of production of sand and gravel. If they had done so successfully, they would have satisfied the requirements of Foster v. Seaton, supra by proving bona fides in development and present demand. Their failure so to act contradicts the speculative, hypothetical and theoretical testimony on which they rely." (Quoted in United States v. J. R. Osborne et al., 77 I.D. 84 at90.

Gibbs pointed out that Osborne's requirement of actual successfulexploitation in order to satisfy the prudent-man test of the discovery requirement had been effectively negated by the Ninth Circuit's holding in Barrows v. Hickel, 447 F2d 80 (1971) and in Verrue v. United States, 457 F2d 1202 (1972), that actual, successful exploitation of a mining claim is not required to satisfy the prudent-man test.

The headnote in the IBLA decision in the present case follows the dis-

credited doctrine of Osborne v. Hammit, and states:

> "Where the evidence shows that there is an abundant supply of similar sand and gravel in the area of the claim, that sand and gravel was being produced and sold in the area on July 23, 1955, and that no sand and gravel had been or was being marketed from the claim as of that date, the fact that the material on the claim is sufficient both as to quantity and quality, as is the abundant supply of similar material found in the area, is insufficient to show that material from this particular claim could have been profitably removed and marketed on July 23, 1955, and the claim is properly declared null and void." A-53.

The Board said in the present case:

> "The best that can be said for the testimony on behalf of the contestees is that there was a general demand for sand and gravel in the Las Vegas area of the type present on these claims, but nothing was adduced to indicate that the cemented gravels prevalent on these claims could have been mined, processed and marketed at a profit before July 23, 1955. The testimony was insufficient to show a discovery because to satisfy the present marketability test the

> the claimants must show the existence of a demand for the material on the specific claims and not simply a general demand for the type of material in question." (citations omitted.). A-71
>
> "The claimants contend the successful mining operations on similar mineral materials in the adjacent Las Vegas Nos. 1, 2, 7, 18 and 27 claims and in other claims nearby before July 23, 1955, is adequate proof that these claims could also have been operated at a profit in that period. This is the same type of theoretical evidence which the court in Osborne v. Hammit, supra, found to be insufficient to satisfy the marketability test as to similar placer mining claims in the Las Vegas area..... " A-72.

The court below took a contradictory position when it upheld the Board's ruling which rejects a showing that the materials on the contested claims were theoretically capable of being marketed since this requires the proof of having actually exploited the material at a profit, and the court disclaims so doing.

Agency decisions here were policy decisions and exceeded discretionary and statutory powers by applying the "too much," or excessive reserves rule.

This amounts to legislative enactment by executive tribunals which lack such authority under our system of separation of powers. Petitioners' application for patent should not have been rejected on the basis of the "too much" rule contrary to the teaching in Baker v. U.S., 615 F2d 224 (9th Cir. 1980) The Baker court said:

> "The IBLA exceeded its discretionary and statutory powers when it adopted its too much or excess reserves rule. Although Congress may see fit to deal with the issue, it has never done so. The IBLA decision amounts to a legislative enactment by an executive tribunal. The IBLA possesses no such authority under our system of separation of powers.
>
> Conclusion
>
> "In sum, we hold that the IBLA's adoption of the too much rule was an abuse of discretion which was contrary to existing mining law. The result reached was arbitrary and capricious."

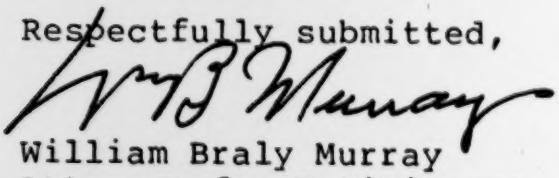
Both the Court of Appeals and the District courts below erred by affirming rejection of plaintiff's claims based on the "too much" rule. The Hearing Examiner found that the contested claims contain enough reserves to last 121 years at the present rate of 400,000 tons a year production. A-43.

CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari be granted and the case be reviewed on the merits.

Dated: January 13, 1981

Respectfully submitted,



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